



On appeal, counsel contends that OWCP erred in failing to acknowledge that appellant had lumbar disc herniation with radiculopathy as a result of her July 30, 2007 work-related injury. He further contends that a February 28, 2013 medical report of Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, and OWCP referral physician, is not entitled to the weight of the medical opinion evidence. In the alternative, he contends that Dr. Franklin E. Caldera, a Board-certified physiatrist's, July 9, 2013 report, creates a conflict in the medical opinion evidence as to her continuing work-related residuals and disability that warrants a referral to a referee physician.

### **FACTUAL HISTORY**

This case has previously been before the Board with respect to an overpayment of compensation.<sup>2</sup> The facts outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to the current appeal are set forth below.

OWCP accepted that on July 30, 2007 appellant, then a 29-year-old nursing assistant, sustained an acute lumbar sprain/strain while lifting a patient at work. On May 11, 2009 appellant returned to work at the employing establishment in a full-time position as a telephone operator.

In a March 26, 2010 decision, OWCP determined that appellant's actual earnings in the position of telephone operator fairly and reasonably represented her wage-earning capacity, and resulted in no loss of wage-earning capacity. It found that her actual earnings met or exceeded the current wages of the job held when injured.

On December 6, 2010 OWCP issued a revised loss of wage-earning capacity determination which superseded the March 26, 2010 decision. It reduced appellant's compensation effective May 11, 2009 based on her ability to earn wages as a telephone operator. OWCP noted that after receiving additional information from the employing establishment which clarified the amount of actual wages lost due to a decrease in premium pay between her date-of-injury position as a nursing assistant and actual premium pay earned in her current telephone operator position, it determined that the prior loss of wage-earning capacity determination was in error. Based on the loss of premium pay between appellant's date-of-injury position and her current position, she was entitled to compensation from May 11, 2009 to

---

<sup>2</sup> Docket No. 10-794 (issued December 15, 2010). In a December 15, 2010 decision, the Board affirmed an August 14, 2009 OWCP decision, finding that appellant received an overpayment of compensation in the amount of \$1,242.72 for the period May 11 to October 25, 2008 and that she was not entitled to waiver of recovery of the overpayment. The Board also affirmed in part a November 5, 2009 OWCP decision, finding that appellant received an overpayment of compensation in the amount of \$5,503.81 for the period May 11 to August 11, 2009. The Board set aside in part the decision, finding that she was not at fault in the creation of a portion of the overpayment for the period May 10 to June 6, 2009 and remanded the case to OWCP to determine whether she was entitled to waiver of recovery of the overpayment. However, the Board found that OWCP properly determined that appellant was at fault for the remaining portion of the \$5,503.81 overpayment for the period June 7 to August 11, 2009 and, therefore, ineligible for waiver of recovery.

December 18, 2010. OWCP utilized the formula in *Albert C. Shadrick*<sup>3</sup> to determine that she had an 87 percent loss of wage-earning capacity.

On October 10, 2012 appellant filed a claim for a recurrence of disability and stopped work on July 24, 2012 due to her July 30, 2007 employment injury. She stated that following the accepted injury, she was reassigned to a telephone operator position which caused her to sit eight hours a day. Appellant experienced low back and leg pain. She stated that the pain from her original injury never stopped.

In reports dated September 10 and November 28, 2012, Dr. Caldera provided a history of the July 30, 2007 employment injury. He noted appellant's complaint of increased low back pain which worsened following her July 2012 lumbar surgery. Appellant's leg pain had improved since surgery. Dr. Caldera provided findings on examination and reviewed laboratory and diagnostic test results. He diagnosed low back pain, lumbar radiculopathy, and lumbar herniated disc, and noted that appellant was status post lumbar decompression. Dr. Caldera advised that her conditions were caused or aggravated by the accepted work injury. He further advised that appellant's pain was most likely due to her lumbar degenerative disc disease. Dr. Caldera indicated that she was totally disabled as of July 25, 2012. He found that appellant was unable to return to her nursing assistant position due to her chronic back pain and physical restrictions.

By letter dated January 17, 2013, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Didizian for a second opinion to determine whether her current symptoms and work stoppage were causally related to her July 30, 2007 employment injury or underlying degenerative disc disease at L5-S1.

In a February 25, 2013 report, Dr. Didizian reviewed the statement of accepted facts and medical record, which included diagnostic test results. He listed a history of appellant's medical treatment which included her July 25, 2012 back surgery. On physical examination, Dr. Didizian reported that appellant had a slow and alternating gait. She had a well-healed surgical scar that was uncomfortable on gentle palpation. There were no secondary changes in the lower back in the form of swelling. Appellant had no pain over the sciatic notch or the greater trochanter. There was no orthopedic deficiency upon examination of the hips, knees, and ankles. On examination of the back, Dr. Didizian reported a hyperlordotic lumbar spine. Pelvic compression and distraction tests were not pain productive. Appellant did not have any spasm in the paraspinals or costovertebral angle tenderness. Dr. Didizian stated that an April 19, 2012 lumbar x-ray showed no evidence of any instability. He advised that appellant's current symptomatology and work stoppage were due to her July 25, 2012 back surgery, which had no bearing to the original injury. Dr. Didizian noted that, although he did not have access to the surgical records to indicate what level and kind of procedure was performed, the surgery did not help. If anything, appellant's symptoms worsened and her recurrent symptoms were related to the failed back surgery. Dr. Didizian indicated that her current symptoms were post failed back surgery and they had nothing to do with her accepted lumbar sprain and strain. Diagnostic studies did not show any change to indicate a new injury prior to the surgery. Appellant's

---

<sup>3</sup> 5 ECAB 376 (1953).

subjective complaints were strictly based on active limitation of motion and pain status post surgery.

Dr. Didizian concluded that appellant had recovered from the accepted conditions and reached maximum medical improvement. Appellant had no physical limitations resulting from work-related disability or preexisting conditions. Dr. Didizian indicated that she was currently receiving conservative and supportive therapy and noted that her current complaints were residuals of her status post surgery and not her original injury. He noted that treatment of sprains was limited to 8 to 12 weeks. Dr. Didizian advised that appellant could not perform her preinjury job based on her failed back surgery and she was a good candidate for vocational rehabilitation. In a work capacity evaluation, he advised that she could perform her usual job with no restrictions.

In a March 7, 2013 decision, OWCP denied appellant's recurrence claim, finding that the medical evidence did not establish that she had any disability commencing July 24, 2012 due to a change or worsening of her accepted employment injury.

In a March 25, 2013 notice, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Didizian's opinion that she no longer had any residuals or disability causally related to her accepted July 30, 2007 employment injury. It afforded her 30 days to submit additional evidence or argument regarding the proposed termination.

By letter dated March 26, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative from the March 7, 2013 OWCP decision.

In a March 6, 2013 progress note, Dr. Caldera stated that appellant had continuing low back pain since 2007 and that she was unable to return to work. He listed examination findings and reviewed laboratory test results. Dr. Caldera reiterated his diagnoses of low back pain and lumbar radiculopathy and opinion that appellant's pain was most likely from her lumbar degenerative joint disease. He found that she was unable to work secondary to pain.

In an April 25, 2013 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that Dr. Didizian's opinion represented the weight of the medical evidence in establishing that she no longer had any residuals or disability causally related to her July 30, 2007 employment injury.

By letter dated April 30, 2013, appellant's counsel requested an oral hearing before an OWCP hearing representative.

In progress notes and reports dated June 11, 2012 to August 8, 2013, Dr. Caldera reiterated his diagnoses of low back pain, lumbar radiculopathy, lumbar degenerative disc disease, herniated disc at L4-5, and status post lumbar decompression, and opinion that appellant's conditions were causally related to the July 30, 2007 employment injury. He stated that since the 2007 work injury, she had worsening low back pain that was exacerbated by activities of daily living, such as prolonged standing and sitting. Appellant was also limited from lifting objects weighing over 10 pounds. Dr. Caldera stated that over time cumulative trauma worsened appellant's condition. Her pain had progressively worsened and she had never

recovered from her original injury. Dr. Caldera advised that this rendered appellant unable to return to her previous occupation or an occupation that required prolonged sitting, standing, or physical exertion. He indicated that she had reached maximal medical improvement and advised that she may still require further medical treatment due to anticipated chronic pain.

In an October 21, 2013 decision, an OWCP hearing representative noted the issuance of OWCP's March 26, 2010 loss of wage-earning capacity decision regarding appellant's telephone operator position. She then affirmed the March 7, 2013 recurrence decision, finding that appellant failed to submit rationalized medical evidence to establish that she was totally disabled commencing July 24, 2012 due to her July 30, 2007 employment injury.

By decision dated December 18, 2013, a second OWCP hearing representative affirmed the April 25, 2013 termination decision. She found that the evidence submitted by appellant was insufficient to overcome the weight accorded to Dr. Didizian's medical opinion as it did not contain a rationalized medical opinion establishing any continuing residuals or disability casually related to her accepted July 30, 2007 employment injury.

### **LEGAL PRECEDENT -- ISSUE 1**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup> Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Due to residuals of her accepted July 30, 2007 employment injury, appellant was unable to resume her previous full-time duties as a nursing assistant. On May 11, 2009 she returned to full-time work at the employing establishment as a telephone operator. OWCP issued a loss of

---

<sup>4</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>5</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *supra* note 4.

wage-earning capacity decision on March 26, 2010 based on appellant's actual earnings as a telephone operator. It found that she had no loss of wage-earning capacity as her actual earnings met or exceeded those held at the time of injury. On December 6, 2010 OWCP issued a revised decision, finding that appellant had an 87 percent wage-earning capacity based on her actual earnings as a telephone operator.

Appellant filed a claim for compensation alleging that she sustained a recurrence of disability beginning July 24, 2012 when residuals from her accepted employment-related injury caused back and leg pain. OWCP denied her recurrence claim on March 7, 2013, finding that the medical evidence of record was insufficient to establish that she had any disability on July 24, 2012 due to a change or worsening of her accepted employment injury. As there is a December 6, 2010 loss of wage-earning capacity determination in place, OWCP is also obligated to evaluate the evidence to determine if modification of the loss of wage-earning capacity was warranted.<sup>8</sup> While an OWCP hearing representative noted, in her October 21, 2013 decision, that a loss of wage-earning capacity decision had been issued, she did not consider the modification issue. As noted above, appellant's entitlement to compensation is based on the loss of wage-earning capacity determination and it remains undisturbed until modified.

On remand, OWCP must evaluate the record to determine whether appellant had established a modification of the loss of wage-earning capacity issued on December 6, 2010. After this and such further development of this issue as it deems necessary, OWCP should issue a *de novo* decision on appellant's claim for compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>9</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>10</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>11</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>12</sup>

---

<sup>8</sup> See C.S., Docket No. 12-626 (issued September 20, 2012); *Katherine T. Kreger, id.* The Board notes that consideration of the modification issue does not preclude OWCP from acceptance of a limited period of employment-related disability, without a formal modification of the loss of wage-earning capacity determination. See also *supra* note 4.

<sup>9</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>10</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>11</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>12</sup> *T.P.*, 58 ECAB 524 (2007); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

## ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained a lumbar sprain/strain while in the performance of her nursing assistant duties on July 30, 2007. As stated, she subsequently returned to work in a telephone operator position and OWCP determined that her actual earnings in the position fairly and reasonably represented her wage-earning capacity and that she had an 87 percent wage-earning capacity. It paid her wage-loss compensation until it terminated her wage-loss compensation and medical benefits on April 25, 2013 based on the opinion of Dr. Didizian, an OWCP referral physician.

The Board finds that the February 25, 2013 report of Dr. Didizian is probative and well rationalized because he reviewed the history of appellant's July 30, 2007 employment injury, her employment history, and summarized the relevant medical evidence.<sup>13</sup> Dr. Didizian advised that appellant's current symptomatology and work stoppage were due to her July 25, 2012 failed back surgery which was not related to the accepted July 30, 2007 employment injury.

Although Dr. Didizian did not review the surgical records, he concluded that the surgery was not helpful because her symptoms had worsened. He related that diagnostic studies did not show any change to indicate a new injury prior to the surgery. Dr. Didizian opined that appellant had recovered from the accepted employment condition and while she could not perform her preinjury job due to her failed back surgery, she could perform her usual job with no restrictions. He concluded that any treatment she received after the July 25, 2012 surgery was not related to the July 30, 2007 work injury.

The progress notes and reports from Dr. Caldera, appellant's attending physician, both prior to and subsequent to Dr. Didizian's February 25, 2013 report do not contain a sufficiently rationalized opinion that appellant continued to have residuals and disability causally related to her accepted lumbar sprain/strain. Dr. Caldera reviewed a history of the July 30, 2007 employment injury and laboratory and diagnostic test results, provided examination findings, and noted that appellant was status post a July 25, 2012 lumbar decompression. He diagnosed low back pain, lumbar radiculopathy and degenerative joint disease, a herniated disc at L4-5, and status post lumbar decompression. Dr. Caldera opined that appellant's conditions and lumbar surgery were caused or aggravated by the accepted employment injury. He advised that her pain was "most likely" due to her lumbar degenerative joint disease. Dr. Caldera found that appellant was totally disabled as of July 25, 2012 and that she was unable to return to her date-of-injury nursing assistant position due to her chronic pain and physical restrictions. He further found that she had reached maximal medical improvement and advised that she may still require further medical treatment due to anticipated chronic pain. The Board notes, however, that OWCP has not accepted the lumbar conditions of lumbar radiculopathy and degenerative joint disease and herniated disc at L4-5. The Board did not authorize appellant's lumbar surgery.

It is appellant's burden to establish that these conditions were causally related to the accepted July 30, 2007 employment injury.<sup>14</sup> Dr. Caldera failed to provide a sufficient

---

<sup>13</sup> See *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>14</sup> *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Mary A. Celia*, 55 ECAB 626 (2004).

explanation on how appellant's lumbar conditions and surgery, and disability were causally related to the accepted July 30, 2007 employment injury or the accepted conditions of lumbar sprain/strain. Vague and unrationalized medical opinions on causal relationship have little probative value.<sup>15</sup> The Board has held that pain is a symptom, not a compensable medical diagnosis.<sup>16</sup> Further, Dr. Caldera's opinion on the cause of appellant's pain is speculative and equivocal in nature.<sup>17</sup> The Board finds that his progress notes and reports are of limited probative value regarding the existence of continuing work-related residuals and disability. Consequently, this evidence is insufficient to cause a conflict of opinion with Dr. Didizian.

The Board finds that Dr. Didizian's opinion constitutes the weight of the medical evidence to establish that appellant no longer has residuals or disability related to her accepted employment condition, OWCP properly terminated entitlement to wage-loss compensation and medical benefits effective April 25, 2013.<sup>18</sup>

On appeal, counsel contends that OWCP erred in failing to acknowledge that appellant had lumbar disc herniation with radiculopathy which required surgery on July 25, 2012 as a result of her July 30, 2007 work-related injury based on the medical reports of appellant's physicians, including Dr. Caldera, and Dr. Hanley, an OWCP referral physician. As stated, it is appellant's burden to prove that conditions OWCP has not accepted are causally related to her accepted employment injury.<sup>19</sup> The Board's jurisdiction, however, is limited to reviewing final adverse decisions of OWCP. OWCP has not issued a final decision on the issue of claim expansion or authorization for surgery. Thus, these issues are not before the Board at this time.<sup>20</sup>

Counsel further contends that Dr. Didizian's February 28, 2013 report is not entitled to the weight of the medical opinion evidence because he did not acknowledge having a copy of the 2012 operative report and failed to discuss her prior lumbar and left leg injuries and to discuss whether these injuries were aggravated by the July 30, 2007 employment injury. Counsel suggests that OWCP should have asked Dr. Didizian to discuss these injuries. Alternatively, he contends that Dr. Caldera's July 9, 2013 report, which established a clear causal relationship between appellant's surgery, residual disability, and her accepted work injury, and created a conflict in the medical opinion evidence.

---

<sup>15</sup> See *D.U.*, Docket No. 10-144 (issued July 27, 2010) (medical reports not containing adequate rationale on causal relationship are of diminished probative value and are insufficient to meet claimant's burden of proof); *Richard A. Neidert*, 57 ECAB 474 (2006); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>16</sup> *K.W.*, Docket No. 12-1590 (issued December 18, 2012).

<sup>17</sup> *Ricky S. Storms*, 52 ECAB 349 (2001) (While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

<sup>18</sup> *G.I.*, Docket No. 13-19 (issued April 2, 2013).

<sup>19</sup> See cases cited, *supra* note 15.

<sup>20</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(a).

As found above, appellant did not submit any rationalized medical evidence to establish that the accepted July 30, 2007 employment injury aggravated her prior work injuries. Dr. Didizian concluded that her current symptomatology and work stoppage were due to her July 25, 2012 back surgery which was not related to the accepted injury in this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the December 6, 2010 loss of wage-earning capacity decision was warranted. The case must be remanded for a proper decision on the issue presented. The Board, however, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective April 25, 2013 on the grounds that she no longer had any residuals or disability causally related to her July 30, 2007 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 18, 2013 is affirmed. The decision dated October 21, 2013 is set aside and the case is remanded for further action consistent with this decision.

Issued: August 18, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board